2010 WL 5853985 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

ESTATE OF Mary Ann WILSON, A Disabled Person.
Arnetta Williams, Guardian of the Estate of Mary Ann Wilson, Petitioner-Appellant,
v.
Karen A. Bailey, Respondent-Appellee.

No. 108487.
May 7, 2010.

On Petition for Leave to Appeal from the Illinois Appellate Court, First District, Appeal No. 1-07-1433
There Heard on Appeal from the Circuit Court, First District, Cook County, Illinois
Circuit Court No. 06 P 3549
Honorable Maureen E. Connors, Circuit Judge presiding

Reply Brief of Arnetta Williams, Guardian of the Estate of Mary Ann Wilson

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*i *TABLE OF AUTHORITIES*

1 *INTRODUCTION

The opinion of the appellate court, in *Wilson II*, addressed the propriety of the trial court's denial of Bailey's motion for substitution of judge for cause. *In re Estate of Wilson*, 389 Ill.App.3d 771, 780-786 (1st Dist. 2009). In her Petition for Leave to Appeal and her Appellant's Brief, the Guardian only presented argument relating to section 2-1001(a)(3) of the Code of Civil Procedure (Code), (735 ILCS 5/2-1001(a)(3) (West 2010)), and the conflict with its common law and statutory duty created by the far-reaching limitations imposed by the majority court's opinion, in *Wilson II*, on a probate court sitting in guardianship. Yet in her Appellee's Brief, Bailey argues issues which were not considered by the Appellate Court in *Wilson II*, issues that the Appellate Court decided in *Wilson I*, (373 Ill.App.3d 1066, 1071-1077), and miscellaneous other arguments not previously raised. Issues not previously raised are forfeited. Issues previously decided are *res judicata*. For purposes of brevity, the Guardian has only responded briefly to issues not before the court. However, to the extent this Court chooses to address any of those other matters, all were briefed in the Guardian's and Bailey's briefs which were submitted as part of the Supplemental Appendix file stamped on May 26, 2009. *Supplemental Appendix for Illinois Supreme Court:* Bailey's Appellate Court Brief, Guardian's Appellate Court Responsive Brief, Bailey's Appellate Court Reply Brief.

I.

STANDARD OF REVIEW

At the beginning of each section of her Appellee's brief, Bailey has stated a “Standard of Review.” However, her standards of review are not standards of review but instead points of law from the cases she cites. A standard of review sets limitations

upon the appellate court's review process. In doing so, standards of review balance judicial authority, make judicial review more efficient, standardize the review process, and give notice to ***2** parties who wish to appeal their cases. *Amanda J. Peters. 2008. "The Meaning, Measure, and Misuse of Standards of Review."* A standard of review is a rule that defines the relationship between the appellate and trial court. For example, the standard of appellate review on questions of law is "de novo."

II.

BAILEY'S STATEMENT OF FACTS ARE BASED ON NON CORROBORATED STATEMENTS OF INTERESTED PERSONS

Bailey argues that the Guardian's Statement of Facts "is inadequate due to omissions of both the family relationships of Respondent, Respondent's husband, David Service ("David"), and Clifford Service ("Clifford") [1] to Bailey and the procedural history of this case." The Guardian's statement of facts, however, is proper and in compliance with Illinois Supreme Court Rule 341(h)(6). 210 Ill.2d R. 341(h)(6).

Bailey's restatement of the facts is devoted, in large part, to hearsay conversations between Bailey or David and Clifford or Mary Ann. Statements made about conversations had with any of the interested parties and Clifford or Mary Ann, a disabled person, are hearsay. The Guardian objected to the introduction of testimony concerning conversations with Clifford as hearsay. To convince the trial court to allow Bailey and David to testify to hearsay conversations with Clifford, Bailey's attorney, who was also Clifford's attorney of record, assured the court, "I do intend to call him, G-d willing and his health permits, I certainly intend to call him." V7 of 8 003 - 004. Only after Bailey's attorney's assurances did the trail court allow Bailey and David to testify as to hearsay conversations involving Clifford. V7 of 8 003 - 004. Clifford Service was not presented as a witness at the trial.

***3** Bailey also presents statements from the record as "facts" without providing sufficient context to allow a fair evaluation of the reliability of the statement. For example, the last sentence of Bailey's Brief at page 7 is "Mary Ann herself denied having poor care at home." V1 of 2 C5. The sentence is taken from GAL Thiel's Report of Guardian Ad Litem. V1 of 2 C5. The report was based on an interview with Mary Ann at the hospital on May 14, 2006. Based on language from this same hearsay report, Bailey charges undersigned counsel and GAL Thiel with violating the Rules of Professional Responsibility. In the report, GAL Thiel described Mary Ann's memory as follows,

She was very frail, thin and weak. She did not know where she was, her address, if she ever had children, why she was in the hospital, how she got there, her age, date of birth, or what medication she takes or what it was for.

She denied having had poor care at home and denied having Parkinson's disease. [Emphasis added] V 1 of 2 C5.

Bailey's issues with the Guardian's statement of the facts are unfounded. First, the court may affirm a trial court's ruling if there exists any basis in the record for so doing. *In re Marriage of Buck*, 318 Ill.App.3d 489, 497 (1st Dist. 2000). Second, in the first paragraph of the Statement of Fact of the Guardian's opening brief, she describes Mary Ann's relationship with Clifford. Third, Bailey claims that when she initially appeared before the trial court, it was her intention to obtain a briefing schedule, not proceed to a hearing, but there is no proof of this in the record which just contains her notice of emergency motion which she scheduled for June 8, 2006. V1 of 2 C30. The Guardian and GAL Thiel intentionally waived their right to respond in writing to the emergency motions, so the court agreed to proceed instanter with the hearing on the emergency motion. V1 of 2 C43.

Moreover, no matter what the nature of the "family" relationship between Bailey and Mary Ann, it does not and cannot justify the unsavory scheme Bailey perpetrated on a seriously demented woman who she claimed to love. Bailey's position is not credible. ***4** Common experience suggests it is implausible that a woman of modest means, who had accumulated a good deal of money and other property through a lifetime of thrift, would suddenly give away her entire financial savings leaving almost nothing for herself. *Matter of Estate of Casey*, 155 Ill.App.3d 116, 123 (4th Dist. 1987).

Courts lend a very unwilling ear to statements by *interested persons* about what a dead or disabled person may have said. Such evidence is subject to great abuse and must be carefully scrutinized. *Keshner v. Keshner*, 376 Ill. 354, 363 (1941). The corroborative testimony of the husband of an *interested person* is incompetent if the wife is directly interested in the outcome of the proceedings. *Heineman v. Hermann*, 385 Ill. 191, 195 (1944). Even when there is no countervailing evidence, the sole testimony of an *interested person* as to what was done or said to her by a decedent or disabled person is of questionable credibility and should be carefully scrutinized, as direct disproof of such declarations and conduct is rarely possible. *Rothwell v. Taylor*, 303 Ill. 226, 230 (1922); *Keshner v. Keshner*, 376 Ill. 354, 363 (1941); *People ex rel. Williams v. Wismuth*, 2 Ill.App.2d 109, 117 (1954).

Furthermore, Bailey's statement of facts is argumentative, disparaging of the trial court, and quite often inappropriate in violation of Illinois Supreme Court Rule 341(h)(6). 735 ILCS 5/2-1001(a)(3) (West 2010). Supreme Court Rule 341(h)(6) provides that the statement of facts should be "stated accurately and fairly without argument or comment."*Id*. Yet Bailey is argumentative and unfair in her presentment of facts in her statement of facts both in this section and others.

***5 III.**

UNDERSIGNED COUNSEL AND GAL THIEL HAVE NOT VIOLATED THE RULES OF PROFESSIONAL RESPONSIBILITY

In response to Bailey's accusation that GAL Thiel and undersigned counsel have violated the Rules of Professional Responsibility, undersigned counsel asserts that neither she nor GAL Thiel have violated the Rules of Professional Responsibility. Furthermore, the briefs in this case are an inappropriate forum to address such claims.

The record demonstrates, to a reasonable person, that Mary Ann's situation was "dire" and she was in need of immediate intervention. Consistent with the testimony of non interested witnesses, and after having had the opportunity to review the entire record, the Appellate Court in Wilson II, agreed with the trial court and determined that the controlling facts in this case are:

> On May 3, 2006, a public health nurse employed by Chicago's department of aging to provide crisis intervention for at-risk senior citizens went to Wilson's home to conduct a well-being check. Wilson was then 86 years old and residing at 10963 South Sangamon Street with Clifford Service, who was also in his 80s. The nurse, Sherry Ponce De Leon, talked with Wilson and Service, and their part-time nurse, Arlette Bowman, and observed that Wilson and Service were frail, confused, and in need of medical intervention. Bowman said there were no medications in the house for Wilson or Service, and Wilson and Service complained they had not been seen by a physician and that their pension checks were missing. Ponce De Leon drove Wilson and Service to St. Mary's of Nazareth Hospital, where they were admitted to the hospital by an emergency room physician and where they would remain for several weeks before being transferred to skilled nursing care. *In re Estate of Wilson*, 389 Ill.App.3d 771, 773.

The facts, as recognized by the court in *Wilson II*, belie Bailey's argument that GAL Thiel and undersigned counsel have violated the Rules of Professional Responsibility. Additionally, on January 27, 2009, after a 5-day bench trial, the Honorable Angela Munari Petrone, of the Circuit Court of Cook County, Criminal Division, found Karen Bailey guilty of multiple counts of financial exploitation of Mary Ann Wilson, a disabled person, and ***6** sentenced her to 11 years in prison. *See: Amicus Curiae of the Cook County Public Guardian Appendix at 1-8*, Conceivably, Judge Petrone's findings of fact will render moot any further arguments regarding the facts of Mary Ann's disability. [2]

Furthermore the issue of fee awards to GAL Thiel and undersigned counsel was not raised in Bailey's notice of appeal in this case, has not been briefed or addressed by the Appellate Court. Thus, any issue regarding fees has been waived or forfeited.

IV.

A.

THE PLAIN MEANING OF THE STATUTE SHOULD BE GIVEN EFFECT

Bailey argues that the plain meaning of the statute (735 ILCS 5/2-1001(a)(3)) should be given effect without reference to the "plain meaning" of section 2-1001(a)(3)(ii), the statute at issue. Actually, nowhere in her brief does Bailey even mention section 2-1001(a)(3)(ii) of the Code of Civil Procedure, which requires that a petition for substitution of judge for cause satisfy the specified pleading requirements before it is transferred to another judge for hearing. Section 1001(a)(3)(ii) requires a petitioner to file a petition substantiated by allegations of prejudice, supported by affidavit, which if true constitute actionable bias or prejudice before the petition need be transferred to another judge for a hearing on the merits. 735 ILCS 5/2-1001(a)(3) (West 2010).

***7** Bailey has ignored the implications of her pleading deficiencies. Contrary to her claim, Bailey does not want the plain meaning of the statute to be given effect. Instead, she wants the court to consider only sections 2-1001(a)(3)(i) and (a)(3)(iii) while writing out of the statute the requirements of section 2-1001(a)(3)(ii) with which she did not comply.

Bailey's argument, reduced to its simplest form, is that the legislature intended section 2-1001(a)(3)(ii) to be meaningless or superfluous and upon the filing *of every* section 2-1001(a)(3) motion, no matter how inadequate, frivolous, or untimely the petition, must be transferred for a full hearing before a judge other than the assigned trial judge. *In re Estate of Wilson*, 389 Ill.App.3d 771, 787 (1st Dist. 2009).

B.

BAILEY DID NOT MAKE A THRESHOLD SHOWING OF JUDICIAL BIAS

The appellate court in *Wilson II*, erred in finding that section 2-1001 (a)(3) does not allow a trial court to undertake a threshold screening to determine whether the petition is timely, meets the pleading requirements of section 5/2-1001(a)(3)(ii), and the other requirements as set forth in *Estate of Theodore Hoellen*, 367 Ill App. 3d 240 (1st Dist. 2006), *Alcantar v. Peoples Gas and Light Company*, 288 Ill.App.3d 644 (1st Dist. 1997), and *Williams v. Estate of Cole*, 393 Ill.App.3d 771 (1st Dist. 2009).

The appellate court also erred in finding that the trial court had prejudged Bailey's motion to vacate. The trial court, sitting in guardianship court, did what any guardianship judge would do when faced with serious questions of financial impropriety and of improper healthcare decisions by an agent pursuant to powers of attorney. First the trial court made sure that the alleged disabled person was safe. Next the court set the agent's accounting for hearing. Bailey, as the agent, was given every opportunity to demonstrate she had complied with her fiduciary duties so the court could make a reasoned decision whether reinstatement ***8** would be proper. Thereafter, the trial court, the interested persons, the GAL and the attorneys spent, collectively, several hundred hours making sure that whatever the ultimate decision, all concerned had a fair chance to make their case. The trial court did not prejudge the matter. To the contrary, the trial court complied with its common law and statutory duties and should be commended, not castigated, for having done so. Moreover, in the criminal case, Bailey had the opportunity to present testimony on the same facts and was found guilty.

C.

THE TRIAL COURT'S EXAMINATION OF BAILEY WAS CONSISTENT WITH ITS STATUTORY AND COMMON LAW AUTHORITY

The trial court did not assume an inappropriate adversarial role. Instead, it adhered to its statutory and common law duty to protect Mary Ann, a person with diminished capacity. *See In re Mark W.*, 228 Ill.2d 365 (2008). As stated in the dissent in *Wilson II*, the trial court's inquiry of Bailey was not "adversarial, hostile or sarcastic, when read in its entirety and in light of the troubling facts that had been disclosed to the court by the GAL, the temporary guardian, and Bailey herself." *Wilson II*, at 793.

Moreover, the totality of the record which is approximately 2000 pages long, demonstrates that the trial court was patient and fair with all the participants and showed a willingness to hear all claims and concerns throughout the proceedings. *Id*. Whatever preliminary opinion the trial court may have formed after Bailey's testimony on June 8, 2006, it was not conclusive. As the record demonstrates, the actual trial took place over several days and Bailey was able to present her witnesses and all proper evidence.

***9 V.**

THE TRIAL COURT'S DENIAL OF BAILEY'S MOTION TO DISMISS THE EMERGENCY PETITION TO REVOKE AGENCY AND FOR ACCOUNTING AND TO SUSPEND BAILEY'S POWERS OF ATTORNEY WAS APPROPRIATE

On June 27, 2006, Bailey filed a 735 ILCS 5/2-619 Motion to Dismiss Emergency Petition to Revoke Agency and Accounting. (V1 of 2 C97-101). The motion was six paragraphs long. *Id*. The motion sought a dismissal of GAL Thiel's Emergency Petition to Revoke Bailey's POA's on the grounds that the court's appointment of a GAL was improper because an order had not been entered first terminating Bailey's POA, pursuant to the Illinois Power of Attorney Act section 755 ILCS 45/2-10. At oral arguments on June 29, 2006, Bailey's attorney again claimed that all actions taken by the trial court after the filing of her first emergency motion were invalid because the court lacked subject matter jurisdiction having failed to comply with the provisions of the "power of attorney act," including the court's right to appoint a GAL or temporary guardian on Mary Ann's behalf. (V1**o**f 2 C2 71-78). The trial court denied the motion.

First, the question of subject matter jurisdiction has already been decided. In *Wilson I*, the appellate court affirmed that the trial court had subject matter jurisdiction to temporarily suspend Bailey's power of attorney and appoint Williams temporary guardian. *Wilson I*, 373 Ill.App.3d 1066, 1071. The court in *Wilson I*, confirmed that "a circuit court's subject matter jurisdiction is conferred entirely by our state constitution," and not by statute. *Id at 1071-1072*

Furthermore and consistent with *Wilson I*, this court has found:

> When, as in this case, a court is charged with a duty to protect the interests of its ward, we believe that by implication it has such powers, *although not expressly given by the statute* vesting the court with jurisdiction over the ward, as are necessary to properly discharge that duty * * *." *Nelson*, 250 Ill.App.3d at 287-88. *In re Mark W.*, 228 Ill.2d 365, 374 (2008). *(Mark II)* [Emphasis Added]

***10** Next, Bailey contends that *In re Mark W.*, 371 Ill. App 3d 81 (1st Dist. 2006) *(Mark I)*, establishes the "Standard of Review" applicable to resolution of the issues pertaining to her motion to dismiss. Bailey has not stated a standard of review, and to the extent the appellate decision in, *Mark I*, suggested that a circuit court judge may lack authority to appoint or retain a guardian *ad litem* after the appointment of a plenary guardian, it was overruled by this court in *Mark II*, 228 Ill.2d 365 (2008). Furthermore, her claim that a guardian *ad litem* cannot take a position adverse to one of the litigant's interest is incorrect. *Id at 374*. The function of a guardian *ad litem* is to act as an advocate for "*the ward's best interests*" even if the ward, guardian or third party disagrees. *Id at 374*.

Finally, Bailey's argument that "no authority exists under Illinois statutes to 'suspend,' a power of attorney ignores the case of, In *re Estate of Doyle*, (4th Dist. 2005) 362 Ill.App.3d 293, rehearing denied, appeal denied, 18 Ill.2d 539 (2006), where the court addressed a situation analogous to the pending matter. In *Doyle*, the court found that where a petition for guardianship is filed and a guardian is appointed notwithstanding the existence of a nonrevoked power of attorney, the court had "implicitly revoked the respondent's power of attorney pursuant to section 2-10 of the Power of Attorney Act (755 ILCS 45/2-10 (West 2004)"

VI.

THE TRIAL COURT DID NOT COMMIT ERROR BY ENTERING JUDGMENT AGAINST BAILEY AND IN FAVOR OF THE ESTATE OF MARY ANN WILSON

At the conclusion of the trial in this case, the court entered the order finding that Bailey had failed to demonstrate by clear and convincing evidence that she had "acted in good faith with fidelity and for the good of the principal." V 8 of 8, R. C238-249. The court noted the difficulty it had in understanding Bailey's oral presentation and written accounting ***11** since a proper Inventory of Mary Ann's assets was never provided. V8 of 8, R. C238-249. The court summarized some of the questionable transactions in which Bailey as an agent pursuant to power of attorney had participated. V8 of 8, R. C238-249. The court also found, for the reasons stated in her oral judgment order, that Bailey was not a credible witness, and it authorized Arnetta as the guardian to revoke all powers of attorney. The court concluded that Bailey had violated her responsibilities under the Power of Attorney Act and had acted to benefit herself. V8 of 8 R. C248-249. The court also found that Bailey failed to keep proper records of receipts, disbursements and significant actions taken on behalf of Mary Ann as required by the statute. V8 of 8 R. C248-249. The court entered judgment against Bailey, as itemized in the Guardian's Petition for Issuance of Citation in Recovery and for Other Relief. V1 of 8, C138-151.

CONCLUSION

For the foregoing reasons, Arnetta Williams as Guardian of the Estate of Mary Ann Wilson respectfully asks this Court to reverse the findings of the appellate court and to affirm the rulings of the trial court.

Footnotes

1 The "marriage" between Mary Ann and Clifford was annulled in case no. 2006 D 8917

2 Bailey has been found criminally liable of financial exploitation of an **elderly** person in excess of $100,000. In *Talarico vs. Dunlap*, this court noted that "[i]t is generally accepted that a criminal conviction collaterally estops a defendant from contesting in a subsequent civil proceeding the facts established and the issues decided in the criminal proceeding." 177 Ill.2d 185, 193, citing 50 C.J.S. Judgments § 922 (1997).

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